Nos. 10-238 and 10-239

In The
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL.,
Petitioners,

v.

KEN BENNETT, ET AL.,
Respondents.

JOHN MCCOMISH, ET AL.,
Petitioners,

v.

KEN BENNETT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

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SUMMARY OF ARGUMENT

In November 1998, following a string of public corruption scandals that rocked their state and the Nation, Arizona voters approved an initiative establishing a public campaign-financing program to "improve the integrity of Arizona state government," "encourage citizen participation in the political process," and "promote freedom of speech under the U.S. and Arizona Constitutions." ARIZ. REV. STAT. § 16-940(A). Arizonans were concerned about corruption and the abuse of money in politics and viewed the Citizens Clean Elections Act as a necessary reform to help restore confidence in their political system and free candidates from the corrupting dependency on private money. ARIZONA SECRETARY OF STATE, 1998 BALLOT PROPOSITIONS 85-89 (1998).

The people's interest in establishing political systems designed to combat corruption and improve integrity in government lies at the foundation of our constitutional democracy. When patriotic Americans gathered together in Philadelphia in the summer of 1787, anti-corruption measures were considered essential to creating an enduring system of government. The Framers, not unlike the citizens of Arizona, viewed

corruption as one of the greatest threats to government. As George Mason warned his fellow delegates at the Constitutional Convention, "if we do not provide against corruption, our government will soon be at an end." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 392 (Max Farrand ed. 1966).

Because the Framers understood that corruption is insidious and could be "expected to make [its] approach[] from more than one quarter," THE FEDERALIST No. 68 (Alexander Hamilton) 411 (Clinton Rossiter ed. 2003), they designed the Constitution to include as many protections against corruption as possible. Part of the genius of the Constitution is the way the Framers crafted innovative, overlapping provisions designed to combat corruption and the appearance of corruption, by closing off avenues where corruption might creep in. These anti-corruption measures were aimed at two general types of corruption: individual, *quid pro quo* corruption, and institutional, "independence corruption," which threatens to draw representatives away from the interests of the people and make them dependent instead on other forces—such as foreign patrons, financial contributors, or other branches of government. *Accord Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000) (explaining that Court precedent recognizes "a concern not confined to the bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors").

For example, specific restrictions like the Foreign Gifts Clause were designed to limit temptations and opportunities for corruption, and, by reaching more broadly than simply outlawing bribery, these restrictions served as prophylactic measures that also targeted the appearance of corruption. (Surely no one thought Benjamin Franklin had been bribed when he received a gold snuff box encrusted with jewels from the King of France in 1785, but the Framers nonetheless thought it best to prohibit such gifts in the future, when the public might not have such trust in their leaders as they did in Franklin.) In addition, the Framers established governmental structures and political systems, such as "check and balances" and election procedures, that were designed to help government withstand corruption and remain appropriately independent. The First Amendment, of course, was also intended to serve as a bulwark against corruption, "reaffirm[ing] the structural role of free speech and a free press in a working democracy." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 21 (1998). These provisions and structures help shield American government from *quid pro quo* corruption and corrupt dependence on improper forces, as well as the appearance thereof.

The Founding-era protections against corruption were enhanced by succeeding generations of Americans, who further amended the Constitution to tackle corruption in the Senate through the Seventeenth Amendment and address congressional self-dealing through the Twenty-seventh Amendment. Thus, from the Founding to

the present, the Constitution's text, history, and structure demonstrate that individual and institutional corruption are core constitutional concerns and that there are a variety of options available to the people and their representatives to effectuate the American anti-corruption ideal.

Arizona's public-financing program is part of a proud tradition of Americans coming together to design political systems based on anti-corruption principles, and fits within the range of options this Court has indicated withstand First Amendment challenge. Like the anti-corruption provisions in the Constitution, Arizona's public campaign-financing system is a well-thought out effort to deter the appearance and reality of corruption while enhancing political speech and encouraging meaningful political participation. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (finding that voluntary campaign public financing "furthers, not abridges, pertinent First Amendment values").

Constitutional history strongly supports Arizona's assertion that it has a "sufficiently important, even compelling, anticorruption interest that is served by its public-financing system." Br. of Ariz. at 52-53. While the limited burden on speech—if any—in this case counsels intermediate scrutiny at most, any level of First Amendment scrutiny should take into account that Arizona's interest in combating real and apparent corruption is deeply rooted in the Constitution's text, history, and structure. *Amici* respectfully submit that Arizona's pragmatic, tailored public-financing system serves this long-established, broad anti-

corruption interest by diminishing candidates' dependence on private contributors, reducing opportunities for individual corruption, and restoring public trust in government.

ARGUMENT

I. THE CONSTITUTION'S TEXT, HISTORY, AND STRUCTURE REFLECT THE FRAMERS' BROAD INTEREST IN PREVENTING THE APPEARANCE AND REALITY OF CORRUPTION AND SUPPORT ARIZONA'S ANTI-CORRUPTION INTEREST IN PUBLIC CAMPAIGN FINANCING.

To the extent that Arizona's public financing system burdens speech at all,[2] under either intermediate or strict scrutiny the State's interest in preventing the appearance and reality of corruption is properly implemented by the system's matching funds provision. *See* Br. of Ariz. at 42-59 (explaining how the Clean Election Act's matching funds provision is tailored to further anti-corruption interests). The text, history, and structure of the Constitution provide strong support for a broad, state anti-corruption interest, like the interest Arizona has in ensuring clean elections, and show that the Framers' efforts, like

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[2] The State does not concede any such burden. Br. of Ariz. at 36, 55. Indeed, Judge Kleinfeld, in his concurrence below, reasoned that Arizona's public financing system imposed "no limitations whatsoever on a [nonparticipating] candidate's speech," McComish Pet. App. 39, and thus heightened scrutiny should not apply at all.

Arizona's, sought to combat both real and apparent corruption.

A. In Drafting The Constitution, The Framers Were Keenly Concerned With Preventing Individual, *Quid Pro Quo* Corruption, As Well As Institutional, "Independence Corruption."

Corruption was a core concern that informed much of the Framers' design of the Constitution. Alexander Hamilton explained that in drafting the Constitution, "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." THE FEDERALIST No. 68, 411 (Clinton Rossiter ed. 2003). "[T]here was near unanimous agreement [among the delegates at the convention] that corruption was to be avoided, that its presence in the political system produced a degenerative effect, and that the new Constitution was designed in part to insulate the political system from corruption." James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 181 (1994).

The Framers viewed the American Revolution as a fresh start from the corruption they saw as endemic to politics and government. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 380 (Max Farrand ed. 1966) ("FARRAND'S RECORDS") (Mason) ("I admire many parts of the British constitution and government, but I detest their corruption.") Indeed, the decision to hold a Constitutional Convention separate from the

ordinary processes established under the Articles of Confederation was in part a reaction to the perceived corruption of state legislatures. *See* 2 FARRAND'S RECORDS 288 (Mercer) ("What led to the appointment of this Convention? The corruption & mutability of the Legislative Councils of the States.").

James Madison's notes of the Constitutional Convention record that 15 delegates used the term "corruption" no less than 54 times, the vast majority by seven of the most prominent delegates, including Madison, Governeur Morris, George Mason, and James Wilson. Savage, 56 J. POL. at 177. Corruption was an express topic of concern on almost a quarter of the days that the members convened. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352 (2009). Scholars have commented that corruption was a "crucial term" during the Convention and that it was a key facet of "political science" for the Framers. *See* J. Peter Euben, *Corruption*, *in* POLITICAL INNOVATION AND CONCEPTUAL CHANGE 220, 221, 242-43 (Terrence Ball et al., eds. 1989); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 32 (1969). At the Founding, concern over corruption was "the common grammar of politics." John M. Murrin, *Escaping Perfidious Albion: Federalism, Fear of Aristocracy, and the Democratization of Corruption in Postrevolutionary America*, *in* VIRTUE, CORRUPTION, AND SELF-INTEREST: POLITICAL VALUES IN THE EIGHTEENTH CENTURY 103, 104 (Richard K. Matthews ed. 1994).

The corruption the Framers sought to avoid can be described in two general categories. First, the Framers were concerned about personal, *quid pro quo* corruption in which a government official receives something of value to act in a certain manner not necessarily in the public interest. Second, a careful reading of the text of the Constitution and the arguments made in support of it makes clear that personal, *quid pro quo* corruption was not the only "corruption" that the Framers sought to avoid: they also aimed to prevent institutional, "independence corruption." *See* Lawrence Lessig, *Democracy After Citizens United*, BOSTON REV., Sept.-Oct. 2010. This second corruption concern focused on the need to protect the three proposed departments of government from becoming dependent on anything other than the people alone. *See id.* at 14 (describing this type of institutional corruption as "at odds with the democratic process—with the exclusive dependence on the people intended by the framers").

The Framers were not detached from the rough and tumble world of politics, and they approached the problems of corruption with a real-world understanding of political systems and their potential to either foster or restrain corruption. "When the delegates spoke of corruption at the convention they did so in a manner that reflected classical republican concerns about dependency, cabals, patronage, unwarranted influence, and bribery." Savage, 56 J. POL. at 181. They were also concerned that even the appearance of corruption posed a risk to civic virtue and the integrity of the fledgling American government. As Professor

Samuel Issacharoff explains, "[t]he Framers appear to have conceptualized corruption as a derogation of the public trust." Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 129 (2010). Corruption could be introduced into government through gifts or inducements, or dependence upon anything other than the people themselves.

As explained below, the Framers' concern over corruption resulted in several distinct constitutional restrictions designed to reduce temptations and opportunities for corruption among public officials and block influences that would tend to compromise the government's intended "dependen[cy] on the people alone." THE FEDERALIST No. 52, 323 (Madison). In addition, the Framers kept in mind their goal of discouraging corruption when designing the structure of the three branches of the federal government and election provisions.

B. The Text Of The Constitution Provides Specific Restrictions Designed To Limit Temptations And Opportunities For Corruption In Government.

Whether or not a public official or an institution of government was actually tainted by a corrupting force, the public might reasonably question whether their representatives' loyalty remained with the public interest. Accordingly, the Framers did more than simply seek to criminalize bribery of public officials—they wrote into the

Constitution specific provisions that would prevent instances of what can generally be termed individual *quid pro quo* corruption and institutional "independence corruption," as well as remove the appearance of either form of corruption.

The Ineligibility and Emoluments Clause. The Constitution provides that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." U.S. CONST. art. I, § 6, cl. 2. This constitutional restriction on Members of Congress reflects the Framers' deep anxiety that legislators' temptation to secure future employment might cloud their duty to act in the public interest. At the Convention, the delegates explained that this provision would "preserv[e] the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption." 1 FARRAND'S RECORDS 386 (Rutlidge).

The delegates' decision that an express constitutional "precaution ag[ainst] intrigue was necessary" stemmed from their observations of the British experience, "where men got into Parl[iament] that they might get offices for themselves or their friends. This was the source of the corruption that ruined their Gov[ernment]." 1 FARRAND'S RECORDS 376 (Butler). George Mason supported the exclusion "as a corner stone in the fabric" of the Constitution and was "for shutting the door at all events ag[ainst] corruption."

particularly in light of the "venality and abuses" that took place in this regard in Great Britain. 1 FARRAND'S RECORDS 376. During the debates over ratification of the Constitution, James McHenry explained that the purpose of the provision was "to avoid as much as possible every motive for Corruption." James McHenry, *Speech before the Maryland House of Delegates* (Nov. 29, 1787), *in* 3 FARRAND'S RECORDS 148.

The Foreign Gifts Clause. The Constitution also mandates that "no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. CONST. art. I, § 9, cl. 8. This constitutional restriction was a reaction to several instances between the Revolution and the Convention when American diplomats received valuable gifts from foreign dignitaries.[3]

Describing these foreign gifts and the public debate that followed, Edmund Randolph explained during the debates over ratification in Virginia that "[i]t was thought proper, in order to exclude

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[3] In 1780, U.S. Ambassador to France Arthur Lee received from King Louis XVI of France a portrait of the King set in diamonds atop a gold snuff box. *See* 18 Op. Off. Legal Counsel 13, 16 n.4 (1994). Lee turned the gift over to Congress, which resolved that he could keep it. *Id.* In 1785, as noted above, Benjamin Franklin received a similar gift from the King of France, which Congress also allowed him to keep. *Id.* At the same time, Congress also allowed Secretary of Foreign Affairs John Jay to keep a gift of a horse from the King of Spain. *Id.*

corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states." DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 330 (2d ed. 1805) (1788). Unlike the scandal over blatant bribery that occurred in Arizona in the 1990s, these foreign gifts to prominent Americans in the 1780s were not considered *quid pro quo* corruption. Congress would surely not have allowed the diplomats to retain the gifts otherwise—but the gifts nonetheless sent the wrong message to the American people. In addition, the Framers wanted to exclude "foreign influence" that could compromise the government's independence (or, more precisely, the government's intended dependence on the American people).

Eligibility Requirements for Elected Office. The Constitution's restrictions on candidates for elected office were also designed to serve a gate-keeping function against possible sources of corruption. Beginning with Congress, the Constitution requires that a Representative or Senator must "be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2; *id.* at § 3, cl. 3. This residency requirement was a response to the fear that wealthy non-residents would purchase elected office. George Mason explained that "[i]f residence be not required, Rich men of neighbouring States, may employ with success the means of corruption in some particular district and thereby get into the public Councils after having failed in their own State." 2 FARRAND'S RECORDS 218. Representatives

were also required to be "seven Years a Citizen," U.S. CONST. art. I, § 2, cl. 2, and Senators "nine Years a Citizen," U.S. CONST. art. I, § 3, cl. 3, because of concern over foreign intrigue.

The Constitution's eligibility requirements for President are even more stringent, reflecting the Framers' concern that this office was particularly susceptible to corruption, foreign and otherwise. James Madison thought that because the Presidency "was to be administered by a single man . . . corruption was more within the compass of probable events." 2 FARRAND'S RECORDS 66. Building on this concern, the Constitution requires that the President be "a natural born Citizen," and have "been fourteen Years a Resident within the United States." U.S. CONST. art. II, § 1, cl. 5. These restrictions were viewed by Madison as necessary because, unlike a monarch who had "that weight of property, that personal interest ag[ainst] betraying the National interest, . . . [the President] would not possess . . . that permanent stake in the public interest which [would] place him out of the reach of foreign corruption." 1 FARRAND'S RECORDS 138.

For all of the provisions described above, the Framers went beyond merely prohibiting bribery and treason, and instead created rules designed to prevent even the appearance of corruption that could potentially arise from foreign gifts, a plum administrative position, or a foreign-born President. Even without any direct evidence of corruption in the fledgling national government, the Framers determined that these broad

prophylactic measures were sufficiently important to include in our Nation's charter.

C. The Constitution Provides Overlapping Structures and Systems Designed to Erect "Every Practicable Obstacle" Against Corruption.

While the structure of American constitutional democracy was obviously inspired by more than just anti-corruption ideals, many of the central features of our republican government were, in fact, significant anti-corruption measures. These measures sought to ensure that the people's representatives remained as independent from corrupting forces as possible—"dependent on the people alone." THE FEDERALIST No. 52 (Madison), 323.

For example, the Framers devised an innovative system of checks and balances to prevent the appearance and reality of corruption as well as to establish separation of powers and enhance policy outcomes. *See generally* THE FEDERALIST No. 51 (Madison) (explaining the need for checks and balances); Teachout, 94 CORNELL L. REV. at 359. Responding to the fear that it would be possible to "purchase the guardians of the people," James Madison explained that "[t]he improbability of such a mercenary and perfidious combination of the several members of government, standing on as different foundations as republican principles will well admit, and at the same time accountable to the society over which they are

placed, ought alone to quiet this apprehension." THE FEDERALIST No. 55 at 342-43. The delegates' belief that multiple, overlapping structures were necessary to cabin possible corruption was particularly evident in their discussion of the appointment power,[4] the veto power,[5] and the treaty power.[6]

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[4] To provide a check against presidential abuse of the appointment power, which could lead to corruption, "[t]he power of appointing to office was brought down by placing a part of it in the Legislature." Annals of Cong. 905 (statement of Rep. Findley, Jan. 23, 1798). Thus, the Constitution gives the President the power to "nominate . . . [and] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States," U.S. CONST. art. II, § 2, cl. 2, but requires that the President's nominations receive "the Advice and Consent of the Senate." *Id.*

[5] James Madison believed that the power of the veto would allow the President to check "the Great & the wealthy who in the course of things will necessarily compose []the Legislative body." 2 FARRAND'S RECORDS 52. But even as the veto could serve as a check against corruption in coordinate branches, the delegates understood that a legislative override was also necessary to keep the veto power from itself becoming a tool of corruption. The delegates thus reduced the number of Senators needed to override a veto from three-quarters to two-thirds, for "[i]f be required, a few Senators having hopes from the nomination of the President to offices, will combine with him and impede proper laws." *Id.* at 586.

[6] The Constitution provides that the President "shall have Power . . . to make Treaties," but limits this power by requiring that the President obtain "the Advice and Consent of the Senate." U.S. CONST. art. II, § 2, cl. 2. Even with this check in place, the delegates recognized "the danger of putting the essential rights of the Union in the hands of so small a number as a majority of the Senate, representing perhaps, not one fifth of the people." 2 FARRAND'S RECORDS 548 (Gerry). Fearing that "[t]he Senate will be corrupted by foreign influence," *id.*, the delegates increased the ratification

In addition, in the process of determining the best way to structure a representative democracy, the delegates were careful to notice the way that the structure of the legislative branch and the provision of regular, fair elections could also serve to deter individual and institutional corruption in the federal government.

The delegates believed that whether Congress would "be governed by intrigue & corruption" depended in part on the size of its membership. 2 FARRAND'S RECORDS 31 (Mason). In fact, the delegates made a final, last-minute revision to the Constitution following George Washington's appeal—his only substantive advice of the Convention—that "[t]he smallness of the proportion of Representatives" was "an insufficient security for the . . . interests of the people." 2 FARRAND'S RECORDS 644. To allow the House to grow at a quicker rate following the first census, the original requirement that "[t]he Number of Representatives shall not exceed one for every forty Thousand" was changed to be "one for every thirty Thousand." U.S. CONST. art. I, § 2, cl. 3.

Elections were also a central part of the Framers' anti-corruption constitutional design. Drawing on the experience of England, where "the electors [we]re so corrupted by the representatives, and the representatives so corrupted by the Crown," THE FEDERALIST No. 41 (Madison) at 256,

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threshold from a simple majority to "two thirds of the Senators present." U.S. CONST. art. II, § 2, cl. 2.

the Framers wanted to avoid financial dependency of one branch of government upon another and make them more accountable to the people. *See* Teachout, 94 CORNELL L. REV. at 362-63. As Madison explained, the problem was that the British House of Commons was elected for seven years, and only a small number of people participated in the election. THE FEDERALIST No. 41 at 256. Without more regular elections, "[t]hese longer terms strengthened the bonds with the Executive and weakened them with the people." Teachout, 94 CORNELL L. REV. at 363.

Under the proposed Constitution, as James Madison explained, even if corruption were to creep in, regular elections would "regenerate the whole body," and "speedily restore all things to their pristine order." THE FEDERALIST No. 63 at 386. While the Framers had concerns that too frequent elections could adversely affect the quality of candidates, *see* 2 FARRAND'S RECORDS 59 (Williamson), they also wanted to have sufficiently regular elections to serve as a check against corruption "if the proofs of that corruption should be satisfactory." THE FEDERALIST No. 66 (Hamilton) at 405.

Finally, the Framers' decision to select the President through the Electoral College was expressly intended to limit "the danger of cabal and corruption." 2 FARRAND'S RECORDS 500 (Mason). Alexander Hamilton explained that if the President was "appointed by the Legislature" the executive "would be tempted to make use of corrupt influence to be continued in office." *Id.* at 524. *See also* 2

FARRAND'S RECORDS 31, 404 (Morris). Hamilton later added that "the executive should be independent for his continuance in office on all but the people themselves," otherwise he might "be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to" obtain reelection. THE FEDERALIST No. 68 at 412. The delegates' solution was to select the President though the Electoral College, which, James Wilson explained, was "as nearly home to the people as is practicable." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 512 (ELLIOT'S DEBATES) (Jonathan Elliot ed.) (1888).

In sum, the Framers of the Constitution created a constitutional system that reflects a broad interest in combating actual and apparent political corruption. The Framers' strong anti-corruption interest bolsters Arizona's argument that its public-financing system serves a sufficiently important government interest under any level of scrutiny. *See* Br. of Ariz. at 52-58. *Accord Buckley v. Valeo*, 424 U.S. 1, 92-93, 96 (1976) (recognizing that public campaign funding serves the purpose of combating real and apparent corruption).

II. AMENDMENTS HAVE PROVIDED EXPANDED PROTECTIONS AGAINST CORRUPTION BY ADDING TO EXISTING CONSTITUTIONAL RESTRICTIONS AND STRUCTURES.

Just as states such as Arizona have attempted to create new political safeguards against ever-evolving threats to the integrity of elections and government, generations of Americans have added to existing constitutional protections against corruption through the amendment process.

The most obvious example of an anti-corruption amendment is the First Amendment, which shields the voice of the people and the pen of the press from government censorship, allowing for healthy criticism and transparency in politics. U.S. CONST. amend. I. In addition, the Seventeenth Amendment provides for direct election of Senators in order to avoid corruption in state legislatures, and the Twenty-seventh Amendment, which responded to allegations of congressional self-dealing, requires that congressional pay raises only take effect following the next election. U.S. CONST. amends. XVII, XXVII.

First Amendment. The First Amendment has "populist roots." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 23 (1998). In adding the Amendment to the Constitution, the Framers were mindful of the "special structural role of freedom of speech in a

representative democracy." *Id.* at 25. As this Court recognized in *New York Times v. Sullivan*, the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." 376 U.S. 254, 269 (1964) (internal quotation omitted). "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931). Accordingly, while the First Amendment protects crucial individual rights, it also serves as a bulwark against corruption and self-dealing incumbents. *See* AMAR, THE BILL OF RIGHTS, at 23 (discussing how the elections of 1800 and 1816 demonstrated the important roles freedom of speech and press play in alerting the people to congressional self-dealing).

Given the First Amendment's historic role in enabling Americans to stand up to corrupt and wrongheaded officials and policies, it is important that Arizona's campaign public-financing plan not encroach upon the anti-corruption principles of the First Amendment in an attempt to root out real and apparent corruption in the State's political system. Significantly, however, there is nothing in the record to support Petitioners' assertion that Arizona's program chills speech. *See* Br. of Ariz. at 39-41; Br. of Clean Elections Inst. at 6-8, 18. Arizona's public-financing program places no limits

on the amount of money privately funded candidates or their supporters can spend. In fact, both sides agree that candidate spending has increased since the public-financing program was established. McComish Pet. App. 53. Also, there has been a twenty percent increase in the number of contested state Senate races and a 300 percent increase in the percentage of incumbents facing competitive challengers in state Senate races. Br. of Clean Elections Inst. at 21.[7] In terms of fulfilling the anti-corruption aspects of the First Amendment, Arizona's public-financing program appears to have enhanced political speech and competition in the State.

Seventeenth Amendment. More than a century after the First Amendment was added to the Constitution, the Seventeenth Amendment was ratified in 1913 following a number of public corruption scandals in the Senate that shook the confidence of the Nation. In perhaps the most infamous case, U.S. Senator William A. Clark of Montana confessed to making a "personal disbursement" of over $140,000 to Montana state legislators. He was forced to resign his seat in 1899 after a unanimous Senate committee report called for his expulsion. Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, The Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 707 (1999). Senator William Lorimer of Illinois was actually expelled by the Senate in 1912 after reports that four state

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[7] To the extent there is any "theoretical" chilling effect on speech—given the record's lack of support for any real impact on speech—it is discussed below in Section III.

legislators had been bribed to change their vote on his behalf. *Id.* Between 1866 and 1900, there were nine Senate investigations of alleged bribery in Senate elections. *Id.* During the 58th Congress (1903-05), fully ten percent of the Senate was either on trial or subjected to legislative investigation. *Id.* Public outrage over corruption in the Senate and state legislatures came to a peak following a series of articles by David Graham Phillips entitled "Treason of the Senate," which exposed big-money corruption and widespread bribery of state legislators.

While the Constitution already did much to combat corruption and ensure independence in the Senate, many believed that more was necessary. In 1911, in response to these scandals, Senator Joseph Bristow of Kansas proposed an amendment to the Constitution requiring that Senators be "elected by the people."[8] His focus was reining in the corruption of the Senate by corporate interests:

> With the development during recent times of the great corporate interests of the country, and the increased importance of legislation relating to their affairs, they have tenaciously sought to control the election of Senators friendly to their interests. The power of these great financial and industrial institutions can be very effectively used in the election of Senators by legislatures, and they

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[8] Sen. Joseph Bristow, *The Direct Election of Senators*, in CONGRESSIONAL SERIAL SET ISSUE 6177 (U.S. G.P.O. 1912).

> have many times during recent years used that power in a most reprehensible and scandalous manner. They have spent enormous amounts of money in corrupting legislatures to elect to the Senate men of their own choosing.[9]

The concerns of the Framers of the Seventeenth Amendment over small-group corruption and dependence on forces other than the people themselves were similar to many of the concerns held by the delegates at the Constitutional Convention. *See, e.g.*, THE FEDERALIST No. 63 at 386 (Madison).

Twenty-seventh Amendment. The Twenty-seventh Amendment began its constitutional journey as the Second Amendment proposed by the First Congress. AMAR, BILL OF RIGHTS, at 17-19. According to Professor Amar, the proposal was designed "to limit the ability of Congressmen to line their own pockets at public expense." *Id.* at 18. While the measure failed to garner enough state support in the 1790s when it was first introduced, it was finally ratified in 1992 as the Twenty-seventh Amendment—another example of constitutional design seeking to restrain self-dealing and corruption.

These three Amendments demonstrate that a broad government interest in combating actual and apparent corruption is a thread that runs through American democracy from the Founding to

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[9] *Id.*

the present. This anti-corruption interest is plainly and legitimately reflected in Arizona's public campaign-financing system, which was adopted to "improve the integrity of Arizona state government . . . , encourage citizen participation in the political process, and . . . promote freedom of speech under the U.S. and Arizona Constitutions." ARIZ. REV. STAT. § 16-940(A) (2010).

III. ARIZONA'S CLEAN ELECTIONS LAW DRAWS FROM COURT PRECEDENT REFLECTING THE FRAMERS' UNDERSTANDING THAT THERE IS A MENU OF OPTIONS AVILABLE TO COMBAT CORRUPTION.

Consistent with the constitutional text, history, and structure discussed above, the Supreme Court has long recognized the compelling nature of the government's interest in preventing corruption and its appearance. Over a century ago, the Court observed that "[i]n a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptation to control these elections . . . by corruption is a constant source of danger." *Ex Parte Yarbrough*, 110 U.S. 651, 666 (1884). This Court has expressly acknowledged that "the prevention of corruption and the appearance of corruption" is an "important" governmental interest. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 901 (2010) (quoting *Buckley*, 424 U.S. at 25-26). *Accord Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518

U.S. 604, 641 (1996) (Thomas, J. concurring) (noting that in "the context of campaign finance reform, the only governmental interest that we have accepted as compelling is the prevention of corruption or the appearance of corruption"). In describing the type of corruption that legitimately concerns government, the Court has explained that it has recognized "a concern not confined to the bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000) (citing *Buckley*).

While the Court has rarely explicitly situated its understanding of corruption in the text and history of the Constitution,[10] many of the anti-corruption principles articulated by our Constitution's Framers are nonetheless reflected in the Court's acceptance of a strong government interest in combating corruption and the appearance thereof. *E.g.*, *Citizens United*, 130 S. Ct. at 901; *Buckley*, 424 U.S. at 25-26.

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[10] *See* Teachout, 94 CORNELL L. REV. at 397-400. For examples of the Court's use of constitutional history in examining the idea of corruption, *see Randall v. Sorrell*, 548 U.S. 230, 280 (2006) (Stevens, J., dissenting) ("[T]he Framers would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities."); *Freytag v. Comm'r*, 501 U.S. 868, 904 (1991) (Scalia, J., concurring in part) ("The Framers' experience with post revolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption."); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 869 n.11 (1995) (Thomas, J., dissenting) ("The Ineligibility Clause was intended to guard against corruption.")

For example, the Court's description of corruption as "a subversion of the political process," *Fed. Election Comm'n v. Nat'l Conservative PAC*, 470 U.S. 480, 497 (1985), maps closely to the concerns expressed by the delegates at the Constitutional Convention. In particular, the Court's explanation that corruption occurs when "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns," *id.*, reflects concerns similar to those expressed by the Framers that public officials might be influenced to betray the interests of the state. Temptation and dependency, of constant concern to the Framers as sources of possible corruption, have also influenced the Court's thinking about corruption. In *Buckley*, the Court recognized "the danger of candidate dependence" on private contributions, explaining that "dependence on outside contributions" may lead to "coercive pressures and attendant risks of abuse." 424 U.S. at 53, 55. These concerns also motivated the passage of Arizona's public campaign financing system, after findings suggested that the purely private "election-financing system . . . [u]ndermine[d] public confidence in the integrity of public officials." ARIZ. REV. STAT. § 16-940(B) (2010).

The Court also shares the Framers' understanding that combating even the appearance of corruption is important to maintaining integrity in government: "avoidance of the appearance of improper influence 'is also critical . . . if confidence

in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). In *Buckley*, the Court expressed concern over "the impact of the appearance of corruption" that is "inherent in a regime of" private contributions. *Id.*; *see also McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 298 (2003) (Kennedy, J., dissenting). And the Court has explained that "the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Buckley*, 424 U.S. at 30. *See also Shrink Missouri*, 528 U.S. at 390 ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.")

In line with the Framers' understanding that political systems should be designed to combat corruption, the Court has recognized that government "may engage in public financing of election campaigns." *Buckley*, 424 U.S. at 57, n.65. In *Buckley*, the Court upheld the presidential public-financing program as "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. In doing so, it recognized the purpose of the presidential public-financing program was "to reduce the deleterious influence of large contributions on our political process, to facilitate

communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Id.* at 91. The Court also recognized "Congress' interest in not funding hopeless candidacies with large sums of public money," concluding that Congress was "justifie[d] [in] withholding [] public assistance from candidates without significant public support." *Id.* at 96. In sum, this Court in *Buckley* emphasized that "[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Id.* at 96.

Arizona's Citizens Clean Elections Act follows these *Buckley* principles exactly. Under any level of scrutiny, Arizona's public campaign-financing program must be upheld as constitutional if this Court's blessing of public financing as an appropriate anti-corruption measure is to have any real meaning. Only with a mechanism like Arizona's matching funds provision can a state attract enough candidates to opt into the system to serve the public-financing program's anti-corruption interest, while protecting public money by ensuring that races are not overfunded. This case is not *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), in which discriminatory contribution limits were applied to two privately financed candidates, competing against one another in the same race, in a campaign system that was entirely privately financed. This case is about whether a state can implement a pragmatic, workable, public-financing system to deter corruption in politics, ensuring that Arizona's

elected officials are dependent upon the people alone.

Like the presidential public-financing program, Arizona's public-financing system "furthers, not abridges, pertinent First Amendment values." *Buckley*, 424 U.S. at 93. *See* Br. of Ariz. at 24-42; Br. of Clean Elections Inst. at 55-62. It does not "deprive" anyone "of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Citizens United*, 130 S. Ct. at 899. It does not erect a "ban on speech," nor does it "repress speech by silencing certain voices." *Id.* at 898-99. *See generally* Br. of Ariz. at 3-12; Br. of Clean Elections Inst. at 5-6. All anecdotal and statistical evidence in the record points to the conclusion that speech has only been increased and supported by Arizona's system of public financing and matching funds.

To the extent Arizona's public-financing system threatens even a "theoretical chilling effect," as the court below phrased it, McComish Pet. App. 34, intermediate scrutiny would likely apply based on the "minimal" burden on political expenditures. *See* Br. of Ariz. at 24-42 (arguing that intermediate scrutiny should apply); Br. of Clean Elections Inst. at 13-40 (same). Particularly when supported by the powerful text and history explaining the importance of specific and structural anti-corruption measures in the Constitution, Arizona unquestionably has a strong and important interest in preventing corruption in its political system. As recognized by *Buckley*, public financing

is an anti-corruption measure substantially related to this interest. 424 U.S. at 96.

Even if the Court were to apply strict scrutiny to Arizona's public-financing program, the matching funds provision is narrowly tailored to the State's anti-corruption interest, given the practical need for any system of public financing to be able to avoid under-funding competitive races—which would discourage candidate participation, lessening the program's anti-corruption impact—or over-funding other races, which would waste public money. *See* Br. of Ariz. at 52-58.

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The Founding generation and generations of Americans since have come together around the principle that political systems should be designed to combat corruption and the appearance of corruption. Anti-corruption principles serve as a core element of the Constitution's text, history, and structure, with overlapping constitutional provisions designed to serve as a bulwark against the insidious nature of corruption. These principles translate into a strong state interest in combating real and apparent corruption in politics and government. Arizona's innovative campaign-financing program is an appropriate state effort to prevent corruption, representing the strengths of federalism and America's proud history of combating corruption through new political systems and structures. Consistent with the anti-corruption principles that shaped the design of the Constitution, the Court should uphold the ability of

the people of Arizona to combat corruption through the Citizens Clean Elections Act.

CONCLUSION

For the foregoing reasons, the Court should affirm the ruling of the lower court.

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